

E-Filed 5/21/10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THANH VAN DO,
Petitioner,

No. C 10-0759 RS (PR)

ORDER STAYING PETITION

v.

GARY SWARTHOUT, Warden,
Respondent.

_____/

This is a federal habeas corpus action filed by a *pro se* federal prisoner pursuant to 28 U.S.C. § 2254. The petition contains four claims, three of which, Petitioner asserts, were exhausted in state court. Petitioner moves for a stay of the federal habeas proceedings (Docket No. 8) until he has exhausted his fourth claim — that the trial court abused its discretion in violation of petitioner’s due process rights.

A district court may stay a mixed habeas petition, i.e., a petition containing both exhausted and unexhausted claims, to allow the petitioner to exhaust state court remedies as to those claims that have not yet been presented to the state’s highest court. *See Rhines v. Webber*, 544 U.S. 269, 277–78 (2005). In *Rhines*, the Supreme Court discussed the stay-and-abeyance procedure, explaining that a stay and abeyance “is only appropriate when

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1 the district court determines there was good cause for the petitioner's failure to exhaust his
2 claims first in state court," the claims are not meritless, and there are no intentionally dilatory
3 litigation tactics by the petitioner. *Id.* If the stay is granted, the petitioner does not have to
4 worry that his newly-exhausted claims will be barred by the statute of limitations because
5 those claims remain pending in federal court. *King v. Ryan*, 564 F.3d 1133, 1139, 1140. (9th
6 Cir. 2009).

7 By contrast, where a petitioner deletes his unexhausted claims and seeks a stay of a
8 fully-exhausted petition while he returns to state court to exhaust the unexhausted claims, no
9 showing of good cause is required to stay the petition. *Id.* Once the claims are exhausted,
10 however, the petitioner must amend his petition to add the newly-exhausted claims;
11 importantly, such amendment must take place within the one-year statute of limitation set
12 forth at 28 U.S.C. § 2244(d)(1), or the newly-exhausted claims will be dismissed as untimely.
13 *Id.* at 1140–41.

14 Petitioner having provided sufficient grounds for *Rhines* stay, the motion is
15 GRANTED. Accordingly, petitioner does not have to worry that his newly-exhausted claim
16 will be barred by the statute of limitations because that claim remains pending in federal
17 court. *See King v. Ryan*, 564 F.3d 1133, 1139, 1140. (9th Cir. 2009). The above-titled
18 action is hereby STAYED until petitioner exhausts the unexhausted claim and, provided
19 petitioner, within thirty (30) days of exhausting said claim, moves to reopen this action and
20 lift the stay, for such additional period of time and until the Court thereafter orders the stay
21 lifted.

22 The Clerk shall ADMINISTRATIVELY CLOSE the file pending the stay of
23 this action.

24 The order terminates Docket No. 8.

25 **IT IS SO ORDERED.**

26 DATED: May 20, 2010

27 
28 RICHARD SEEBORG
United States District Judge